United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1104

To be argued by
ALBERT S. DABROWSKI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1104

UNITED STATES OF AMERICA,
Appellee,

—v.—

JULIAN TAYLOR, WALTER B. FREDERICK, JR., and REUBEN McCRARY,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

PETER C. DORSEY
United States Attorney for the District of Connecticut
141 Church Street
New Haven, Connecticut 06510

ALBERT S. DABROWSKI
Assistant United States Attorney for the District of Connecticut

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BRIEF FOR THE APPELLEE

Statement of the Case

On March 29, 1973 a Federal Grand Jury sitting in Hartford, Connecticut, returned a two-count indictment charging Julian Taylor, Marlon Eubank McLennan, a/k/a "Lonnie", Walter B. Frederick, Jr., a/k/a "Sonny" and Reuben McCrary with conspiring to possess and with possessing and concealing forged and altered United States Savings Bonds in violation of Title 18, United States Code, Sections 371 and 472. All four defendants entered pleas of not guilty to each of the two counts. However, Julian Taylor and Marlon McLennan withdrew their not guilty pleas and entered pleas of guilty to Count One (the conspiracy count) prior to trial.

On May 14, 1973, less than two months after the indictment, the Honorable M. Joseph Blumenfeld, United States District Court Judge, noted for the record in open Court that the government was ready for trial. On September

10, 1973 the defendant Frederick filed a motion to suppress a quantity of United States Savings bonds and certain other incriminating evidence found during a January 19, 1973 search of his residence. The defendant also sought to suppress an incriminating statement made at the time of his arrest after he was confronted with the evidence discovered during the search. Judge Blumenfeld denied Frederick's motions in a written decision dated January 2, 1974 after hearing testimony on December 3, 1973.

Trial by jury before Judge Blumenfeld commenced on November 12, 1974. On November 15, 1974 Judge Blumenfeld declared a mistrial after the jury was unable to reach a verdict. On November 26, 1974 Judge Blumenfeld transferred the case to the Honorable T. Emmet Clarie, Chief United States District Judge, for retrial. Trial by jury before Judge Clarie commenced on January 22, 1975. Co-defendants Taylor and McLennan testified as government witnesses at both trials. On January 24, 1975, after deliberating for less than one hour, the jury found each defendant guilty on both counts.

On February 3, 1975 defendant McLennan was sentenced by Judge Blumenfeld under the provisions of the Young Adult Offenders Act, 18 U.S.C. § 4209, to one year imprisonment, execution of sentence suspended, with two years probation. On February 18, 1975 Judge Blumenfeld sentenced defendant Taylor to three years imprisonment, execution of sentence suspended, with three years probation. A special condition of that probation requires Taylor to seek psychiatric help.

On May 10, 1975 appellant Frederick was sentenced by Judge Clarie to two years imprisonment on each of the two counts, to run concurrently. On that same date Judge Clarie sentenced appellant McCrary to three years imprisonment on each count, to run concurrently. Both Frederick and McCrary are free on $5,000 bonds pending this appeal

Statutes Involved

Title 18, United States Code, Section 371:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, United States Code, Section 472:

§ 472. Uttering counterfeit obligations or securities

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

Plan for Achieving Prompt Disposition of Criminal Cases (United States District Court for the District of Connecticut)

4. *All Cases: Trial Readiness and Effect of Non-Compliance.*

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

Questions Presented

I. Did the affidavit for the search warrant provide sufficient information to support a finding of probable cause?

II. Was the post-arrest admission made by Frederick the product of an illegal search?

III. Did the government violate the District of Connecticut Plan for Achieving Prompt Disposition of Criminal Cases?

Statement of Facts

The Offense

In late November or early December, 1972 one hundred and seventy-eight (178) $100 United States Savings bonds having a maturity value of $17,800 and twenty-six (26) $50 Savings Bonds having a maturity value of $1,300 were stolen from the Connecticut State Comptroller's office in Hartford, Connecticut.

Appellants Frederick and McCrary first contacted appellant Taylor and then defendant McLennan to acquire their assistance in forging and passing the stolen bonds. Taylor, a convicted forger, who had met McCrary in jail, was asked to assist in validating the bonds and to obtain false identification to be used in attempting to cash them. McLennan, a friend of Frederick and an employee of the United Bank and Trust Company, was asked to and did obtain a validating stamp from the Albany Avenue Branch of the bank where he worked. The bonds were forged and validated by McCrary, Taylor and McLennan. Taylor and McCrary made two trips to Massachusetts where attempts to pass the bonds failed for lack of sufficient identification. Taylor and McCrary had made separate trips to Massachusetts and New York, respectively, in efforts to obtain false identification.

At both trials McLennan and Taylor testified for the government. The government introduced a bank stamp (Exhibit 4) from the Albany Avenue branch of the United Bank and Trust Company which was identified as the stamp used to place the validation on the stolen bonds. The government also introduced 156 savings bonds (Exhibit 3) found during a search of Frederick's residence. Several of these bonds bore Boston, Massachusetts bank stamps which had been placed on the bonds during the unsuccessful attempts to cash them. At the time of the search Frederick made an

incriminating statement (*See* The Search, below) which was introduced in evidence.

The Search

The relevant facts relating to the search were clearly summarized by Judge Blumenfeld in the Ruling on the Motion to Suppress at 2-3.

> On January 18, 1973, Special Agent Dewey Santacroce of the Federal Bureau of Investigation was contacted by an unnamed informant and requested to come to the informant's residence. When he arrived at the residence, accompanied by another special agent, Santacroce found the informant to be "belligerent," "covert," and armed with a butcher knife and at least one pistol. The informant stated that he had $1 million in stolen United States Savings Bonds which he wished to sell to the government for $1,800. He gave Santacroce a single bond to establish his credibility. Santacroce checked the serial number of the bond given to him by the informant against those on a list of bonds recently stolen from the State Comptroller's Office in Hartford. He verified that the bond given to him was among those listed as having been stolen. Santacroce then gave this information to Special Agent McCarthy, believing the matter to lie within the jurisdiction of the Secret Service rather than the F.B.I.
>
> On January 19, at approximately 5:00 P.M., McCarthy spoke to the informant at his residence, having been introduced by Santacroce and his partner. The informant gave McCarthy 19 more Savings Bonds and advised the agent that he had observed the remaining bonds at the defendant's residence at 172 Tower Avenue two days earlier, on January 17. McCarthy verified that the 19 bonds were also among

those listed as having been stolen from the State Comptroller's Office.[1]

At approximately 7:00 p.m. on that same date Secret Service Agent McCarthy and Trooper Richard Raposa, of the Connecticut State Police, applied to Judge William Ewing of the Connecticut Circuit Court for a warrant authorizing the search of the residence of the defendant, Walter Frederick, at 172 Tower Avenue, Hartford, Connecticut. The allegations of probable cause included in the affidavit in support of the warrant were:

3. That on Dec. 6, 1972, at 1500 hours, a complaint was received at Troop H in Htfd., from Mr. Morin of the State Comptroller's Office, 20 Trinity St., in Htfd. that several U.S. Savings Bonds were missing.

4. That subsequent investigation revealed that 178 $100.00 U.S. Savings Bonds value $13,350.00, maturity value $17,800.00 and 26 $50.00 U.S. Savings Bonds value $975.00, maturity value $1,300.00 were missing. See list attached.

5. That included in the U.S. Savings Bonds missing was a series of 17 $100.00 U.S. Savings Bonds Serial Number C1010008334E through C1010008350E.

6. That on this date information was gained through a government informant that the above mentioned bonds were located at the above mentioned address of 172 Tower Ave., Htfd.

7. That information had been received from this informant in the past, which had proved to be reliable and factual.

8. That on Wed., Jan. 17, 1973, the informant went to 172 Tower Ave., Htfd., address where he observed said bonds. Subsequently, said informant took (20)

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[1] The informant was Julian Taylor, a co-defendant in this case.

of said bonds into his possession and turned them over to Secret Service Agent John J. McCarthy.

9. That based on the above information probable cause does exist to believe that the aforementioned bonds are at the above address.

10. That these twenty bonds were among those listed as taken from the Comptroller's Office.

The warrant was executed at approximately 9:00 p.m. One hundred and thirty-three (133) United States Savings bonds having a maturity value of $100 and twenty-three (23) bonds having a maturity value of $50 were discovered in the basement of Frederick's residence. Frederick was placed under arrest and taken from the kitchen of his home into another room away from the appellant McCrary who was in the kitchen but was not placed under arrest at that time. After being advised of his Constitutional Rights Frederick stated "if all the bonds weren't accounted for, they would be the following week." (Trial transcript at 454.)[2]

ARGUMENT

I.

The affidavit for the search warrant provides sufficient information to support a finding of probable cause.

Both appellants Frederick and McCrary appeal from Judge Blumenfeld's denial of the Motion to Suppress. Before considering the merits of their claim it should be noted that only the appellant Frederick was a party to

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[2] A total of 204 Savings Bonds had been stolen from the State Comptroller's Office. Twenty were turned over by the informant. One Hundred and fifty-six were discovered in Frederick's basement. Twenty-eight bonds were never found.

the original motion to suppress. Appellant McCrary neither filed such a motion nor objected to the introduction of the bonds at trial. (*See,* Trial transcript at 365, 448.) Rules 12 and 41 of the Federal Rules of Criminal Procedure require that a motion to suppress evidence be made before trial unless the defendant was not aware of grounds for such a motion until trial. *See Jones* v. *United States,* 362 U.S. 257, 264 (1960); *Agnello* v. *United States,* 269 U.S. 20 (1925). The appellant McCrary improperly raises this suppression issue for the first time on appeal. However, since the appellant Frederick filed a proper motion and objected to the introduction of the seized evidence at trial in a timely fashion the government will address the issues raised by that motion.

A simple reading of the affidavit in support of the search warrant clearly demonstrates that sufficient information was presented to Judge Ewing to support an independent finding of probable cause. Probable cause is a common sense concept. It is the functional equivalent of "reasonable grounds," and must be determined "on factual and practical considerations of everyday life . . . ." *United States ex rel. De Negris* v. *Menser,* 247 F. Supp. 826, 830 (D. Conn. 1965), *aff'd,* 360 F.2d 199 (2d Cir. 1966). "Only a probability of criminal activity . . . ," *United States* v. *Gimelstob,* 475 F.2d 157, 160 (3d Cir. 1973), "and not a prima facie showing . . . ," *United States* v. *Mulligan,* 488 F.2d 732, 736 (9th Cir. 1973), is required to establish probable cause. *See, e.g., United States* v. *Harris,* 403 U.S. 573 (1971); *Jones* v. *United States,* 362 U.S. 257 (1960); *Draper* v. *United States,* 358 U.S. 307 (1959); *Brinegar* v. *United States,* 338 U.S. 160, 175 (1949); *Raffone* v. *Adams,* 468 F.2d 860 (2d Cir. 1972); *United States* v. *Jiminez-Badilla,* 434 F.2d 170 (9th Cir. 1970).

The appellants basic contention is that the present affidavit is deficient for failing to satisfy the two-pronged test of *Aguilar* v. *Texas,* 378 U.S. 108, 114 (1964):

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones* v. *United States*, 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf* v. *United States*, 376 U.S. 528, was *"credible"* or his information "reliable."

The appellants rely on *Aguilar* to conclude that the warrant should not have been issued because at most the agents had "the bare word of an informant whose behavior can best be described as bizarre . . . " (Brief for Appellants at 6). The affidavit in the present case goes far beyond the affidavit in *Aguilar* which simply stated:

> Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." (*Aguilar* v. *Texas, supra*, 378 U.S. at 109).

In the present affidavit some of the "underlying circumstances" were presented. State Trooper Raposa and Agent McCarthy verified, and so stated in their application for the warrant, that all of the twenty bonds received from the informant on two separate occasions were among bonds listed as stolen from the State Comptroller's Office. As Judge Blumenfeld stated in denying the defendant's motion to suppress "[o]ne can scarcely think of more persuasive 'underlying circumstances' supporting an informant's claim that he knew where stolen bonds were located than surrender of some of the bonds themselves." (Ruling at 5.) In addition the affidavit contained a statement that "informa-

tion had been received from this informant in the past, which had proved to be reliable and factual" and that the informant had personally observed and obtained the bonds at the residence to be searched. The fact that the information received from the informant in the past involved the same offense does not make the information less reliable or factual. The agents checked the serial number on each bond and verified them all as stolen. An untested informant's information may be corroborated by other facts even of they corroborate only innocent aspects of the story. *United States* v. *Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972); *United States* v. *Dzialak*, 441 F.2d 212 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971). Here, the corroboration went to the very heart of the offense.

There is an additional reason, in view of *United States* v. *Harris*, 403 U.S. 573 (1971), for crediting the informant's information. The informant implicated himself in criminal activity and, on two separate occasions, placed critical evidence directly into the hands of Federal Agents. As the Supreme Court stated in *Harris*:

> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct. *Id.* at 583-84.

The appellant's claim that *Harris* does not apply because the second turnover of 19 bonds and the related statement by the informant Taylor that the rest of the bonds were at

Frederick's house was more "exculpatory than inculpatory" is void of any merit. (Brief for Appellants at 6.) On January 18 the informant stated he had $1,000,000 in bonds and gave one of those bonds to FBI Agent Santacroce. Agent Santacroce turned the case over to Agent McCarthy who ascertained that $19,000 (face value) in bonds (including the one bond turned over) of that series had been stolen. Agent Santacroce called Taylor on January 19 to set up another meeting and was told by Taylor that there wasn't a "million dollars in bonds available." (Hearing Transcript at 31.) This is entirely consistent with what the agents had learned—that only $19,000 in bonds had been stolen. At the second meeting Taylor surrendered 19 more bonds and stated the rest were at Frederick's house. Each of these 19 bonds was checked and found to be stolen further implicating the informant in criminal activity. This is certainly placing "critical evidence in the hands of the police" within the meaning of *Harris*.

The appellants argue that even if the *Aguilar* tests are met by the affidavit the evidence seized is inadmissible because "the true state of facts was not made known to Judge Ewing." (Brief for Appellants at 6.) The appellants cite two examples of information they claim to have been unjustifiably withheld from Judge Ewing:

1. the informant's "unusual behavior" including the initial false statement that he had $1,000,000 in stolen bonds; and

2. the informant's criminal record.

Judge Blumenfeld found the informant's "unusual behavior" was not particularly surprising in view of the fact that he was meeting with a federal agent to negotiate the sale of stolen bonds. (Ruling at 8.) Although the informant had a criminal record Agent McCarthy was "under the impression he had been arrested before" but had not checked for a criminal record prior to signing the affidavit.

(Hearing Transcript at 33.) It is true that the informant could have been lying to the affiants or that the affiants could have been lying to the judge, or both. But as Judge Friendly stated in *United States* v. *Burke*, Slip. Op., 2d Cir., May 15, 1975, Docket No. 75-1021 at 3578, "such risks are inherent in any system allowing, as it must, that search warrants may be issued on something less than a full trial of the existence of probable cause." However, when the evidence is viewed in light of the successful search and the information developed at the suppression hearing and at trial it is clear that no misstatement of fact of any nature was made in the affidavit. The fact that the affiants did not communicate every bit and piece of information they had obtained during their investigation does not diminish the validity of a proper determination of probable cause.

In *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965) the Supreme Court indicated that the test for probable cause must be viewed in a "commonsense and realistic fashion."

> [Affidavits for search warrants] are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

The affidavit in the case at bar was viewed by a neutral and detached Judge who determined that probable cause existed. In addition Judge Blumenfeld reviewed the affidavit and determined that "[t]he application for the warrant contains sufficient information to support a finding of probable cause." (Ruling on Motion to Suppress at 3.) These independent determinations are entitled to great deference by a reviewing Court. *See, e.g., United States* v. *Freeman*, 358 F.2d 459, 462 (2d Cir.), *cert. denied*, 358 U.S. 882

(1966); *United States* v. *Epstein*, 240 F. Supp. 84, 85 (S.D.N.Y. 1965); *Conti* v. *Morganthau*, 232 F. Supp. 1004, 1006 (S.D.N.Y. 1964); *United States* v. *Koonce*, 485 F.2d 374, 380 (8th Cir. 1973); *Bastida* v. *Henderson*, 487 F.2d 860, 863 (5th Cir. 1973); *United States ex rel. Saiken* v. *Bensinger*, 489 F.2d 865, 866 (7th Cir. 1973); *Guzewicz* v. *Slayton*, 366 F. Supp. 1402, 1406 (E.D. Va. 1973). The resolution of doubtful or marginal cases "should largely be determined by the preference to be accorded to warrants" otherwise police officers will be discouraged from submitting their evidence to judicial officers before acting. *United States* v. *Ventresca*, *supra* at 108-09; *see Jones* v. *United States*, 362 U.S. 257, 270 (1960); *United States* v. *Freeman*, *supra* at 461.

II.

The post-arrest admission made by Frederick was voluntarily and intelligently given, without any threat, promise or coercion and was not the product of an illegal search.

Following the discovery of some of the stolen bonds in his basement Frederick was placed under arrest and advised of his Constitutional Rights by Agent McCarthy. Frederick then stated "if all the bonds weren't accounted for they would be the following week." Judge Blumenfeld found that "there is nothing in the record to suggest that the defendant's statements subsequent to his arrest were not voluntarily given." (Ruling at 9.)

The appellants do not contest the voluntariness of this statement on appeal but assert that it must be suppressed since it was the product of an unlawful search. Since the search was lawful the statement was not the product of any illegal search and, therefore, was admissible. The introduction into evidence of this statement by Frederick in a joint trial with McCrary did not prejudice McCrary because

the statement did not mention him and a proper cautionary instruction was given by Judge Clarie. (Tr. at 455); *See Bruton* v. *United States*, 391 U.S. 123 (1968); *United States* v. *Lipowitz*, 497 F.2d 597 (3d Cir. 1969); *United States* v. *Lyons*, 397 F.2d 505 (7th Cir. 1968).

III.

There was no violation of the District of Connecticut Plan for Achieving Prompt Disposition of Criminal Cases.

All four defendants filed motions to dismiss claiming that the government violated Rule 4 of the District of Connecticut Plan for Achieving Prompt Disposition of Criminal Cases. Only Taylor pursues this claim on appeal.[3]

On May 14, 1973, less than two months after the indictment and within four months of the arrests, Judge Blumenfeld, at the government's request, noted for the record that "the government was ready for trial." (A complete transcript is attached to appellant Taylor's motion to withdraw his appeal.) In *United States* v. *Pierro*, 478 F.2d 386, 389 (2d Cir. 1973), this Court held that the "Government must communicate its readiness for trial to the court *in some fashion* within the six month period . . . ." A written Notice, although preferred is not required.[4] The government complied with the Plan for Achieving Prompt Disposition of Criminal cases by giving oral notice to the Court on May 14, 1973.

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[3] Taylor has filed a motion to withdraw his appeal which had not been acted upon as of May 27, 1975.

[4] On May 1, 1974 the government initiated the practice of filing a written notice in all criminal cases.

CONCLUSION

The government, for the reasons submitted, respectfully urges that the judgment of conviction be affirmed.

Respectfully submitted,

PETER C. DORSEY
United States Attorney for the District of Connecticut
141 Church Street
New Haven, Connecticut 06510

ALBERT S. DABROWSKI
Assistant United States Attorney for the District of Connecticut

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-1104

United States of America appellee

v

Julian Taylor, Walter B. Frederick, Jr. and Reuben McCrary appellants.

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue Brooklyn, New York

That on the 2nd day of June, 1975, deponent served the within Briefs upon Charles Sturtevant, Fed. Pub. Defender, 450 Main Street Hartford, Conn. 06103

Thomas G. Dennis Esq. 656 Ellington Rd. So. Windsor Conn.

Peter J. Zaccagnino, Jr., Esq. 104 Asylum St., Hartford, Conn.

Attorney(s) for the Appellants in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 2nd day of June, 1975

Harold Silberzweig

HAROLD SILBERZWEIG
Notary Public State of New York
No. 30-8995450
Qualified in Nassau County
Commission Expires March 30, 19 76